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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
ARCH COMMUNICATIONS GROUP, INC. and PAGING NETWORK, INC.	)	WT Docket No. 99-365
	)	File No. 0000053846, *et al.*
	)	DA 99-3028
For Consent to Transfer Control of Paging, Narrowband PCS, and Other Licenses	)	
	)	

To: Chief, Wireless Telecommunications Bureau

OPPOSITION TO MOTION TO DISMISS

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Section 1.45(b) of the Commission's Rules, 47 C.F.R. § 1.45(b), hereby opposes the Motion to Dismiss filed by Paging Network, Inc. ("PageNet") on September 22, 2000 (the "Motion"). The Motion requests that the Commission dismiss Metrocall's Petition for Reconsideration or Informal Complaint (the "Petition")[1] filed on September 12, 2000, as supplemented on September 18, 2000. In support hereof, the following is respectfully shown:

I. The Commission has Authority to Review the Petition.

PageNet argues that the Petition is procedurally defective and must be dismissed because it has been filed past the thirty-day period specified by Section 405 of the Communications Act of 1934, as amended (the "Act"). See Motion at 3-4. Contrary to PageNet's assertions, the Commission does not lack authority to revisit previous grants, even after the reconsideration period has ended. Regardless of the "finality" of a decision, the Commission retains its plenary power over spectrum licensing, and where material facts relevant to the basis for a grant subsequently are disclosed to the

[1] Capitalized terms not otherwise defined herein will have the meaning ascribed to them in the Petition.

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Commission, it has both the authority and the duty to act. See, *e.g.*, Communications and Control, Inc., 15 FCC Rcd. 5428, n.37 (2000) (FCC has authority to set aside grants made through inadvertent error); Branywine Main-Line Radio, Inc., 60 FCC 2d 755 (1976) (petition for reconsideration filed three years after decision on appeal would be treated as request that the Commission ask the Court of Appeals to recall its mandate; allegations of improper Executive Branch influence in renewal proceeding considered); Central Alabama Broadcasters, Inc., 48 FCC 2d 998, ¶ 3 (1974) (untimely petition considered where it raised character qualifications issues). Consequently, even assuming arguendo that Metrocall's Petition did not comport with any of the procedures for petitions for reconsideration or informal complaints,[2] the Commission nonetheless has an obligation to review new facts not disclosed in connection with its prior approval, especially where such new facts demonstrate violations of the Act or the Rules or raise serious public interest considerations. See, *e.g.*, Central Alabama Broadcasters, *supra*.

In this case, Arch's lenders proposed to take the extraordinary step of requiring the future licensee of PageNet's facilities to sell specified FCC licenses. Arch and PageNet's Amended Plan, as presented to the Bankruptcy Court on September 7, 2000, clearly stated that the SMR licenses were to be sold. See Petition at Exhibit One. Only

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[2] PageNet argues that Metrocall has filed the Petition for purposes of delay and to gain some form of unfair competitive advantage in the marketplace. See Motion at 2-3. This contention is specious. The Bankruptcy Court will not hold its confirmation hearing on the Amended Plan until October 26, 2000, thus the Arch/PageNet merger could not close before then in any event. Moreover, PageNet does not contemplate closing on the merger until November of 2000 at the earliest. See Amended Disclosure Statement at Sections III.F. and III.H. As for whatever difficulties PageNet's bankrupt status may impose in terms of retaining customers and employees, or entering into contractual arrangements, those difficulties are not of Metrocall's creation; at least some of those difficulties began before PageNet's filing in bankruptcy, and long before the filing of Metrocall's Petition. For example, PageNet has steadily lost customers for the approximately one and one-half years preceding its Chapter 11 filing. See Paging Network, Inc. SEC Form 10-Q, "Introduction," filed August 11, 2000 (decline in units in service from 10.1 million at December 31, 1998 to 7.9 million at June 30, 2000). PageNet had proposed to terminate some 1,950 employees as early as February 1998. See Paging Network, Inc. SEC Form 10-K, Part I, "Business – Strategy and Restructuring," filed May 4, 2000. PageNet had eliminated approximately 300 permanent and 950 temporary positions in 1999, and was already experiencing high employee turnover. Id. at "Business – Employees."

after Metrocall pointed out the transfer of control issues inherent in allowing lenders to designate the disposition of FCC licenses (including the timing and minimum purchase price for that disposition), did Arch twice revise the Amended Plan to include language which purportedly gave it greater discretion in raising the $110 million required to meet its lenders' repayment demands. See Petition at Exhibits Two and Three. Similarly, the Final Order Authorizing Debtors In Possession to Enter into Post-Petition Financing ("DIP Financing Order"), also dated as of September 7th, grants liens on all of PageNet's assets, "including, without limitation, all ... licenses" to the Arch/PageNet lenders. See DIP Financing Order, pertinent portions of which are attached to the concurrently-filed Reply to Arch's Opposition as Reply Exhibit One, at ¶ 8. It thus appears the Bankruptcy Court was asked to, and did grant, security interests in and liens on FCC licenses, without notice to the FCC and contrary to applicable FCC precedent.

To date, and presumably relying on Paragraph 17 of the DIP Financing Order (which requires any challenges to the liens granted in the DIP Financing Order to be commenced within 60 days from the appointment of the Committee), neither PageNet nor the banks have sought to amend the grant language contained in Paragraphs 8 and 10 of the DIP Financing Order to exclude FCC licenses from the definition of "Post-Petition Collateral."

Thus, the revisions to the credit facility on which Arch will rely to consummate its merger with PageNet, which in at least one version *required* the divestiture of FCC licenses, and the liens granted to the banks under the DIP Financing Order, at a minimum, warrant further investigation. See, *e.g.*, Edwin A. Bernstein, 6 FCC Rcd. 6841 (Rev. Bd. 1991) (supplemental hearing ordered where successful applicant had failed to disclose change in lender and financing plans).

II. The Petition Raised Material and Substantial Questions Concerning a Possible Unauthorized Transfer of Control.

It has long been recognized that an entity's control over a licensee's finances may give that entity control over the licensee. See, e.g., KOWL, Inc., 49 FCC 2d 962, ¶ 4 (Rev. Bd. 1974), quoting Heitmeyer v. FCC, 95 F.2d 91, 99 (D.C. Cir. 1937) ("[i]t is well known that one of the most powerful and effective methods of control of any business, organization, or institution, and one of the most potent causes of involuntary assignment of interests, is the control of finances"). Metrocall respectfully submits that the provisions of the Arch credit facility, together with the language of the DIP Financing Order granting such lenders liens in, among other assets, PageNet's FCC license, to secure both post-petition and pre-petition claims of such lenders,[3] Reply Exhibit One at ¶¶ 8 and 10, have crossed the line that separates legitimate lender protections from unauthorized transfers of control.

PageNet argues that Metrocall has not cited a case in which a lender's requirement that a licensee sell particular licenses to meet loan repayment commitments has been found to constitute a transfer of control. Motion at 5-6. The reason is simple: Metrocall has found no case in which lenders to an FCC licensee have shown such disregard for Section 310(d) of the Act as to specify particular FCC-licensed assets that the licensee must sell, as well as dictate the timing and price for that sale.[4] Moreover, it is significant that the license sale obligations at issue here are not triggered only in the event that such defaults in its loan payment obligations; that is a far cry from standard

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[3] The Commission has repeatedly held that direct security interests in licenses are unlawful. See, e.g., Walter O. Cheskey, 13 FCC Rcd. 10656, ¶ 7 (1998).

[4] PageNet's quotation of the FCC's holding in News International, Inc., that certain negative covenants, when given for the protection of lenders "do not *necessarily* represent a transfer of control requiring prior Commission approval" (emphasis added), thus misses the point. See Motion at 7. Depending on the facts of the particular case, and the degree of control over the licensee's independent judgment that is evidenced, various covenants for the protection of creditors may or may not be acceptable.

loan agreements. The first version of the Amended Plan presented to the Bankruptcy Court by PageNet and Arch did not present "facts even remotely comparable" to the cases in which various lender protections have been found to be permissible. Cf., Motion at 5.

Despite the subsequent revisions to the Amended Plan, the evidence suggests that Arch and its lenders consider the SMR licenses as collateral to be liquidated for the partial repayment of Arch's borrowings. Attached to Metrocall's concurrently-filed Reply to Arch's Opposition, as Reply Exhibit Two, is a copy of the pertinent page of the Response of the Official Committee of Unsecured Creditors (the "Committee") in Opposition to Metrocall's Amended and Restated Plan (the "Committee Response"), in which the Committee explains the meaning of the credit facility provisions Metrocall has challenged. According to the Committee, Arch's banks perceive that Metrocall's offer, rather than the proposed Arch credited facility, would devalue "their collateral (the SMR Spectrum)". See Reply Exhibit Two. It thus appears that the subsequent versions of the Amended Plan, each of which purported to give Arch progressively more discretion in the manner in which it prepaid its banks $110 million, were simply attempts to "spin" the facts in a manner that would be palatable to this Commission. See Petition at Exhibit One through Exhibit Three.

Consequently, contrary to PageNet's characterizations, there is nothing "confusing" about Metrocall's argument that the credit facility covenants at issue here have the same effect as would the exercise of a direct security interest in the SMR licenses; that analogy was perfectly apt. Cf. Motion at 10. Not only do the banks perceive "the SMR Spectrum" as "their collateral," but a number of creditors have apparently convinced the Bankruptcy Court to treat all of PageNet's licenses as collateral. See Reply Exhibit One.

PageNet relies on Airgate Wireless, LLC, 14 FCC Rcd. 11827 (Com. Wir. Div. 1999), for the proposition that, if the Commission finds the provisions in Arch's credit agreement to be impermissible, the appropriate remedy would be to require amendments to the credit agreement. See Motion at 5. However, Airgate did not involve the undisclosed and unauthorized exercise of control over FCC licenses by a creditor. That case arose in the context of applications to acquire certain F block broadband PCS licenses by assignment, and certain other C block broadband PCS licenses through the auction process. The agreements at issue in that proceeding were relevant to the prospective licensee's demonstration that it qualified for the "publicly traded corporation" exemption to the C and F block attribution rules, and the lengthy discussion of the agreements in that case indicates that the Commission had ample opportunity to review the applicant's ownership structure and *de facto* control, *prior* to a grant of the applications. The Commission in Airgate found that certain of the provisions in the applicant's agreements with its former parent company raised "concerns" about the level of the former parent's control over the applicant's policy decisions, see Airgate at ¶¶ 27-28; and the Commission therefore conditioned its grants of the assignment and "long form" applications upon revisions to the agreements to alleviate those concerns. Id. at ¶¶ 50-56.

In contrast, Arch was apparently ready to cede control over a major policy decision – the decision to sell more than 120 licenses which would collectively comprise multiple local SMR systems and a ubiquitous nationwide network on one frequency block, as well as the terms on which that sale would occur – to institutional lenders, after the grant of Arch's transfer of control applications to acquire those licenses, and without any disclosure to the Commission. A lender need not exercise control over the day-to-day operations of a debtor company, if the lender has the power to interfere sufficiently with the licensee's policy or financial decisions, and in doing so, it may cross the line that separates a *bona fide* creditor from an undisclosed real party in interest. See, *e.g.*, SaltAire Communications, Inc., 8 FCC Rcd. 6284 (1993) (impermissible control found where due to noteholders' rights to earnings and assets, and requirements for noteholder consent, applicant would be unable to sell additional stock "as a practical matter"). The designation by Arch's lenders of FCC licenses to serve as "collateral" for the partial, pre-default repayment of a licensee's borrowings, or the inclusion of repayment terms that "as a practical matter" left the licensee with little or no choice but to divest such licenses as the lenders consented to be sold, crossed that line. Together with the grant of liens in favor of various lenders on all of PageNet's licenses in the DIP Financing Order, without objection from the current or prospective licensees or notice to the Commission, the control granted to Arch's lenders by the credit facility terms cannot be viewed as an isolated lapse. Rather, the record demonstrates, at best, a disturbing disinterest on the part of Arch as to who controls the disposition of the numerous FCC licenses.

Finally, PageNet's comparison of the covenants Arch proposed to give its lenders with permissible options is inaccurate. Motion at n. 13. Typically, an option is granted by a company to grant a prospective purchaser, who has given some present consideration, the right to purchase assets or stock under specified terms and conditions. In contrast, the prospective purchaser here has yet to be identified, and has given nothing of value to secure a right to obtain the SMR or other FCC licenses in the future. Nor does it appear that Arch has granted that right as a matter of its independent business judgment; the contemplated sale at issue here was at least initially "required" by Arch's secured creditors. Moreover, contrary to PageNet's implication, options are not always permissible; the existence of options may be among the factors the Commission considers in determining where control of a licensee lies. See Channel 31, Inc., 45 RR 2d 420 (1979) ("where, as here, an applicant contracts to buy a broadcast station and also initially contracts to give a third party lender the right to take control of the station at any time, a very real question is raised concerning the bona fides of the applicant to purchase and operate the station in the public interest"; subsequent modifications to limit lender's stock conversion rights did not eliminate concerns over control); see also, George E. Cameron Communications, 91 FCC 2d 870 ¶ 33 (Rev. Bd. 1982).

Conclusion.

For all the foregoing reasons, Metrocall respectfully requests that PageNet's Motion be denied, and the relief requested in its Metrocall's Petition be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Veronica Blakeney, a secretary with the law firm of Alston & Bird LLP, hereby certify that on the 4th day of October, 2000, I caused to be served the foregoing Opposition to Motion to Dismiss by hand-delivery (unless otherwise noted), upon the following:

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